

¹ The parties agreed before the March 10, 2010 preliminary hearing that the respondent and its insurance carrier shall authorize Dr. Reintjes to evaluate claimant's cervical spine and provide necessary treatment. It was also agreed that respondent and its insurance carrier shall reimburse claimant \$500 in unauthorized medical expenses for the services of Dr. Murati.

The issue is:

- Whether claimant suffered a work-related injury arising out of and in the course of her employment with the respondent resulting in bilateral carpal tunnel syndrome.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is undisputed that claimant suffered a work-related accident on July 21, 2009, while working for the respondent. The accident and subsequent injuries were sustained while claimant was attempting to lift a heavy trash bag. Claimant was employed as a personal assistant by the respondent. Her duties included housekeeping, cooking and driving clients to appointments and other errands. The respondent provided treatment for these injuries through Dr. Terry D. Schwab, who initially diagnosed claimant with a partial tear of the left rotator cuff and a herniated disk at C5-C6. As a result of these injuries, Dr. Schwab restricted claimant from lifting more than 10 pounds with her left arm and more than 25 pounds with her right arm. Claimant was able to continue performing her duties within these restrictions.

Claimant experienced neck pain, pain radiating down her arms to her forearms and numbness and tingling off and on in her arm and occasionally in her fingers.² The tingling and numbness worsened, causing Dr. Schwab to refer claimant for EMG studies of both upper extremities. The EMG studies revealed claimant had bilateral carpal tunnel syndrome. As treatment for the carpal tunnel syndrome, Dr. Schwab recommended surgery for the claimant.

Claimant's attorney referred her to Dr. Pedro A. Murati for an evaluation. Dr. Murati evaluated claimant on January 25, 2010, and diagnosed her with bilateral carpal tunnel syndrome due to double crush, probable left rotator cuff tear and neck pain with signs and symptoms of radiculopathy. As to causation, Dr. Murati opined that all of claimant's diagnoses were related to her July 21, 2009 work-related accident.

Dr. Schwab opined that claimant's bilateral carpal tunnel syndrome was not related to the July 21, 2009 accident and injuries. He did acknowledge that it is well known that carpal tunnel syndrome can be a work-related injury due to repetitive use of the wrists and hands.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of

² P.H. Trans., Cl. Ex. 1, Dr. Schwab's Aug. 17, 2009 office notes.

compensation and to prove the various conditions on which his or her right depends.³ A claimant must establish that his personal injury was caused by an “accident arising out of and in the course of employment.”⁴ The phrase “arising out of” employment requires some causal connection between the injury and the employment.⁵ The existence, nature and extent of the disability of an injured workman is a question of fact.⁶ A workers compensation claimant’s testimony alone is sufficient evidence of the claimant’s physical condition.⁷ The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.⁸

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁹ Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker’s disability.¹⁰

The ALJ reasoned that claimant’s carpal tunnel syndrome did not begin until two to three months after the accident; therefore, the syndrome did not directly relate to the accident. This reasoning overlooks the August 17, 2009 notes of Dr. Schwab. The notes of Dr. Schwab on that date indicate claimant had been experiencing pain radiating down her arms and numbness and tingling off and on in her arm and occasionally in her fingers. Moreover, this condition was reported by the claimant less than a month after the accident.

There are two medical opinions as to causation of the bilateral carpal tunnel syndrome of the claimant. Dr. Murati opined that the carpal tunnel syndrome is related to the work-related accident. Dr. Schwab opined that the claimant’s carpal tunnel syndrome

³ K.S.A. 2009 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

⁴ K.S.A. 2009 Supp. 44-501(a).

⁵ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

⁶ *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

⁸ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

¹⁰ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

is not related to the July 21, 2009 work-related accident. At this juncture in the proceeding, this Board Member determines that neither opinion is more persuasive than the other. It is claimant's own testimony and her statement to Dr. Schwab reflected in his August 17, 2009 notes that tips the scale in favor of the claimant. The claimant has met her burden of proof that her bilateral carpal tunnel syndrome arose out of and in the course of her employment with the respondent.

This Board Member will not address claimant's request for an order to respondent to provide a list of three doctors (from which claimant would select a physician) to treat claimant's carpal tunnel syndrome. This issue was not raised before the ALJ. It has long been the position of this Board that it will not address issues that were not presented to the ALJ.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision and order of this Board Member that the preliminary hearing Order of March 11, 2010 entered by ALJ Kenneth J. Hursh denying medical treatment for claimant's bilateral carpal tunnel syndrome is reversed. The matter is remanded to the ALJ to proceed in accordance with this Order.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Michael Snider, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Brad E. Avery,¹² Administrative Law Judge

¹¹ K.S.A. 44-534a.

¹² This claim was transferred from ALJ Hursh to ALJ Avery effective May 24, 2010.